Supreme Court, U.S.
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NO. _____

In The
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

CAROLINA FEED MILLS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK J. GORDON
MILLBERG, GORDON & STEWART, P.L.L.C.
1101 HAYNES STREET, SUITE 104
RALEIGH, NORTH CAROLINA 27604
(919) 836-0090
Counsel for Petitioner

32 pp

QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly concluded that Carolina Feed Mills did not waive a limitations defense based on untimely service where it filed a written waiver of Rule 12 service of process defenses and it failed to raise any Rule 12 service of process defenses in its answer.

PARTIES TO THE PROCEEDING

Petitioner CSX Transportation, Inc. is a corporation which is publicly traded and which is a wholly owned subsidiary of CSX Corporation, a publicly held corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reason for Granting the Writ 2

Conclusion 7

Appendix

Court of Appeals Opinion, 12/17/02 ..... 1a

District Court Order, 3/29/02 ..... 6a

District Court Order, 2/15/02 ..... 12a

Rule 12(h)(1), South Carolina Rules
of Civil Procedure 17a

TABLE OF AUTHORITIES

Pages

CASES

Eastern Refractories Co., Inc. v. Forty Eight Insulations, Inc., 157 F.3d 169 (2nd Cir. 1998). 6

Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993) 3, 5

Hoffman v. Benson, 147 F.R.D. 205 (W.D. Mo. 1993) 6

In Re Highland Acres, Inc., (1994 WL 473357 (Bkrtcy. D. Mont.) 6

Jones v. St. Tammany Parish Jail, 4 F. Supp. 2d 606, 610 n. 2 (E.D. La. 1998) 6

Unisun Insurance v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (2000), certificate dismissed as improvidently granted, 2002 WL 1159873 (S.C. 3 June 2002) 3, 4, 5, 6, 7

RULES

S.C.R.Civ.P. 12(h)(1) 4, 5, 7

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit opinion No. 02-1470 (Dec. 17, 2002) was unpublished and is contained herein at Appendix p. 1a. The District Court opinions were also unpublished and can be found herein at Appendix p. 6a and p. 12a.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The judgment of the Fourth Circuit Court of Appeals was entered on December 17, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves South Carolina Rule of Civil Procedure 12(h)(1), the text of which is set forth in the Appendix at p. 17a.

STATEMENT OF THE CASE

CSX filed this negligence action in the United States District Court for the District of South Carolina seeking recovery against Carolina Feed Mills for damages to its railroad track and train resulting from the catastrophic failure of a farm pond dam located on the property of Carolina Feed Mills near the town of Cheraw, South Carolina. Carolina Feed Mills moved for summary judgment based on limitations, and CSX moved for partial summary judgment on Carolina Feed Mills' defense of limitations. The District Court initially denied the motion for summary judgment by Carolina Feed Mills and granted the motion by CSX for partial summary judgment on the defense of limitations. Appendix at p. 12a. Subsequently, upon motion of Carolina Feed Mills, the District Court issued another order reversing its original order and granting Carolina Feed Mills' motion for summary judgment based on limitations. Appendix at p. 6a. This second order also denied CSX's motion for partial summary judgment on the defense of limitations. CSX appealed the District Court decision to the Fourth Circuit Court of Appeals. The Fourth Circuit affirmed the District Court's second order. Appendix at p. 1a.

REASON FOR GRANTING THE WRIT

The district court and the court of appeals erred as a matter of law.

A defendant asserting a limitations defense in South

Carolina must also assert Rule 12 service of process defenses where limitations allegedly expired due to untimely service. Failure to do so results in waiver of both the service of process defense and the limitations defense.

The South Carolina Court of Appeals has recently reemphasized the rule in South Carolina that the waiver of a service of process defense precludes the assertion of any statute of limitations defense which is based on inadequate service of process. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); Unisun Insurance v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (2000), cert. dismissed as improvidently granted, 2002 WL 1159873 (S.C. 3 June 2002). Both Garner and Unisun are controlling law on this issue and are directly on point. In Garner, the sheriff served the plaintiff's summons and complaint one day after limitations expired. The defendants asserted a limitations defense in their answers but failed to raise insufficient service as a defense. The trial court granted defendants' motion for summary judgment based on the statute of limitations, but the Supreme Court of South Carolina reversed, specifically ruling that the defendants had waived their service defenses and thus their limitations defense. Garner, 312 S.C. at 487, 435 S.E.2d at 850.

Similarly, the plaintiff in Unisun failed to serve defendant Bruce Hawkins properly before the expiration of limitations. The Unisun case arose out of an automobile accident which occurred on 8 October 1994 and which involved a vehicle driven by Bruce Hawkins and another driven by an insured of Unisun Insurance. Unisun, 342

S.C. at 539, 537 S.E.2d at 560. Unisun paid its insured for losses sustained in the collision and filed suit against Bruce Hawkins and his parents to recover those payments. Id. The suit was filed on 3 October 1997 and served on the Hawkins' residence on 4 October 1997, but Bruce Hawkins no longer resided at that residence. Id. He was never served, although he and his parents did respond to the lawsuit. Id. The answer of defendant Bruce Hawkins contained the following language: "Plaintiffs have failed to serve defendant Bruce Hawkins within the three year statute of limitations." Id. The defendant then moved for summary judgment on limitations grounds, contending that the plaintiff "failed to timely serve him prior to the running of the statute of limitations." Id. at 540, 537 S.E.2d at 560. The trial court granted defendant's motion for summary judgment based on limitations.

The South Carolina Court of Appeals reversed, holding explicitly that "a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issues or defenses regarding service, including a statute of limitations defense." Unisun, 342 S.C. at 541, 537 S.E.2d at 561. The court observed that the defendant's statute of limitations defense was "inextricably tied to the attempted service on him . . . ." Id. After concluding that the language of defendant's answer did not adequately raise the defense of insufficiency of service of process, the court held that the defendant's service of process defense was thus waived by the operation of Rule 12(h)(1). Id. As a result, "[because [the defendant] failed to challenge the service of process properly, he has also waived his statute of

limitations defense under Garner." Id. at 543, 537 S.E.2d at 562.

Timely service and preservation of the service defense were the issues in Unisun and are the issues here. The defendant in Unisun claimed to be entitled to summary judgment on limitations grounds because plaintiff "failed to timely serve him prior to the running of the statute of limitations." Id. at 539, 537 S.E.2d at 560. Defendant makes the same claim in this case, namely, that it was not served with process prior to the expiration of limitations.

However, the Unisun case establishes that it makes no difference whether this untimely service occurred due to an incorrect address or a fumble by the sheriff or simply a lack of delivery prior to the statute; whatever the reason, defendant must assert a Rule 12 process defense. Whenever a limitations defense is based on untimely service, as it was in Unisun and Garner and is in this case, then defendant must assert a process defense in its answer, or else waive both the process defense and the limitations defense, as they are "inextricably tied" together. As the Unisun court stated, "a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issue or defenses regarding service, including a statute of limitations defense." Id. at 541, 537 S.E.2d at 561(emphasis added). As South Carolina hornbook law notes, the waiver provision of Rule 12 affects not only the motion itself, "but any argument based on the alleged defect." James F. Flanagan, South Carolina Civil Procedure 100 (2d ed. 1996) (quoted by the Unisun court). See also

Eastern Refractories Co., Inc. v. Forty Eight Insulations, Inc., 157 F.3d 169 (2nd Cir. 1998) (Rule 12 (b)(5) defense was based on fact that amended complaint was "untimely served"); Jones v. St. Tammany Parish Jail, 4 F. Supp 2d 606, 610 n. 2 (E.D. La. 1998) ("Rule 12(b)(5) provides for dismissal of a claim if service of process was not timely effected"); Hoffman v. Benson, 147 F.R.D. 205 (W.D. Mo. 1993) (plaintiff served defendant after statute expired under Missouri law, defendant asserted limitations and "untimely service" defenses, and court found service defense dispositive). Thus, untimely service, inadequate service, or no service are all versions of the same thing: insufficient service of process under Rule 12(b)(5).

The Unisun court specifically makes this point in several places. Without mincing words, the court corrects the trial court's conclusion that non-service is not a Rule 12(b)(5) matter: "This was error." Unisun, 342 S.C. at 540, 537 S.E.2d at 561 n.3. The court quotes from Wright and Miller's civil procedure treatise in that footnote and subsequently in the text of the opinion: "Rule 12(b)(5) is the proper vehicle for challenging both the mode of delivery or the lack of delivery of the summons and complaint." Id. at 543, 537 S.E.2d at 562 (emphasis in original). Finally, the Unisun court quotes with approval language from a Montana court indicating that Rule 12(b)(5) must be invoked when the defendant asserts that a "Complaint is not timely." Id. at 542, 537 S.E.2d at 562 (quoting In Re Highland Acres, Inc., (1994 WL 473357 (Bkrtcy. D. Mont.).

Carolina Feed Mills, like the defendant in Unisun, is complaining about untimely service in this case. Like the defendant in Unisun, Carolina Feed Mills has waived its service defenses and thereby its limitations defense. Indeed, defendant here has waived its process defenses twice: first, by specifically waiving those defenses in the waiver form signed by defense counsel on 19 April 2001, and then by operation of Rule 12(h) upon defendant's failure to assert any service defenses whatsoever in its answer. See App. p. 17a. Defendant here cannot argue, like the defendant in Unisun did, that the language in its answer should be construed liberally under Rule 8 to have raised a service defense. Here, defendant has completely omitted any reference at all to service in its answer. Applying these clear and unequivocal principles of South Carolina law, CSX was entitled to summary judgment on Carolina Feed Mills' asserted limitations defense, and Carolina Feed Mills' motion for summary judgment should have been denied. The District Court erred in changing its mind and reversing itself on the issue of waiver, and the Court of Appeals erred in affirming the District Court's decision in this regard.

CONCLUSION

Petitioner respectfully contends that both of the lower courts have erred with respect to this particular legal issue. For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Frank J. Gordon

Frank J. Gordon
Counsel of Record
Attorney for Petitioner
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
FAX: (919) 836-8027

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion
United States Court of Appeals
for the Fourth Circuit
entered December 17, 2002 ..... App. 1a

Order of
The Honorable Terry L. Wooten
United States District Court for the
District of South Carolina
Florence Division
entered March 29, 2002 ..... App. 6a

Order of
The Honorable Terry L. Wooten
United States District Court for
the District of South Carolina
Florence Division
entered February 15, 2002 ..... App. 12a

Rule 12 (h)(1), South Carolina Rules
of Civil Procedure ..... App. 17a

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CSX TRANSPORTATION, INCORPORATED,
Plaintiff-Appellant

v. No. 02-1470

CAROLINA FEED MILLS, INCORPORATED,
Defendant-Appellee.

December 4, 2002, Argued
December 17, 2002, Decided

Before WILKINSON, Chief Judge, and WILLIAMS and MOTZ, Circuit Judges.

COUNSEL

ARGUED: Frank J. Gordon, MILLBERG, GORDON & STEWART, P.L.L.C., Raleigh, North Carolina, for Appellants. John Thomas Lay, Jr., ELLIS, LAWHORNE & SIMS, P.A., Columbia, South Carolina, for Appellee.
BRIEF: Marvin C. Jones, BOGOSLOW, JONES, STEPHENS & DUFFIE, P.A., Walterboro, South Carolina, for Appellant. M. Catherin Cauthen, ELLIS, LAWHORNE & SIMS, P.A., Columbia, South Carolina, for Appellee.

OPINION:

PER CURIAM:

In this negligence action, the district court granted summary judgment on statute of limitations grounds to Carolina Feed Mills, Inc. ("Carolina"), finding that CSX Transportation, Inc. ("CSX") failed to "commence" the action by both timely filing and serving the complaint, as required under South Carolina law. We conclude, as did the district court, that Carolina neither waived its statute of limitations defense nor is estopped from asserting it. Accordingly, we affirm.

I.

On March 18, 1998, a CSX freight train derailed at a milepost located in Chesterfield County, South Carolina. Carolina operates a business near the milepost, and a pond is located on Carolina's land. CSX alleges that the pond was "held by a dam constructed and maintained" by Carolina and that the "dam failed catastrophically which caused the water escaping the pond to flow onto the roadbed and railroad tracks immediately eroding them."

Prior to the filing of the instant action, on July 27, 1999, CSX conductor Henry Webb, the driver of the derailed train, sued both CSX and Dr. Winston Godwin, the owner of Carolina. CSX then filed a cross-claim against Godwin for its property damage. Godwin had insurance coverage from both Auto Owners Insurance Company and

State Farm Fire and Casualty Company. Carolina and CSX retained the attorneys who also represent them in the instant case.

The parties settled Webb's claim. In mediating CSX's cross-claim, a dispute arose between Auto Owners and State Farm regarding which insurance company had primary coverage. In December 2000, CSX reached a partial settlement with State Farm and agreed to re-file the lawsuit against Carolina, rather than against Winston Godwin, and to pursue further recovery solely from Auto Owners.

When the prior suit concluded in December 2000, Carolina's counsel "orally requested that CSX counsel not serve the new lawsuit on Winston Godwin (as president and owner of Carolina Feed Mills) but rather send the lawsuit directly" to counsel. On January 11, 2001, Carolina counsel sent a letter to CSX counsel reiterating the request as to service of the complaint: "I am waiting on service of the complaint against Carolina Feed Mills. I can accept service of the complaint; therefore, forward it to my attention."

On March 12, 2001, CSX filed the complaint. The three-year statute of limitations expired on March 18, 2001. *See* S.C. Code Ann. § 15-3-530. On March 22, 2001, CSX counsel sent Carolina counsel a "notice of lawsuit and request for waiver of summons." Carolina counsel signed the waiver on April 9, 2001. The waiver was filed on April 26, 2001, and the complaint was deemed served on that

day. *See* Fed.R.Civ.P. 4(d)(4).

The waiver provided that Carolina "agreed to save the cost of service of a summons and an additional copy of the Complaint" by not requiring that it "be served with judicial process in the manner" provided by Federal Rule of Civil Procedure 4. The waiver also provided that Carolina "will retain all defenses or objections based on a defect in the summons or in the service of the summons."

On May 5, 2001, Carolina filed its answer and asserted a statute of limitations defense. It did not assert an insufficiency of service or process defense. The parties moved for summary judgment on the statute of limitations defense.

II.

The district court granted summary judgment to Carolina, reasoning that South Carolina law governed when an action "commenced" for purposes of the statute of limitations, and that CSX had timely filed but failed to timely serve its complaint within the three-year statute of limitations, which expired on March 18, 2001. *See* S.C.R.Civ.P. 3(a) ("A civil action is commenced by filing and service of a summons and complaint."); S.C.Code ann. § 15-3-20.* CSX timely filed its complaint on March 12, 2001, but the complaint was not deemed served until April 26, 2001 - over a month after the running of the statute of limitations. Rejecting CSX's reliance on *Unisun Insurance v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (S.C. Ct. App.*

2001), the district court also held that Carolina had not waived its statute of limitations defense by failing to assert insufficiency of service of process in its answer. The district court further held that Carolina was not estopped from claiming the statute of limitations because the parties never discussed the applicable statute of limitations and, although Carolina's counsel did agree to accept service, he did not agree to waive any statute of limitations defense.

III.

We have reviewed the record, briefs, and applicable law and have considered the oral arguments of both parties, and we conclude that the district court was correct. Accordingly, we affirm on the basis of the district court's well-reasoned opinion. *See CSX Transport., Inc. v. Carolina Feed Mills, Inc.*, No. 4:01-725-25 (D.S.C. March 29, 2002).

AFFIRMED

----------Footnotes----------

*The South Carolina legislature amended this provision, effective May 24, 2002, to provide that a "civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." The parties agree that the amended provision does not apply to the instant action.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CSX TRANSPORTATION, INCORPORATED
Plaintiff-Appellant,

v. No. 01-725

CAROLINA FEED MILLS, INCORPORATED,
Defendant-Appellee.

ORDER

3/29/02

This matter comes before the undersigned upon the defendant's motion to amend and/or alter the undersigned's previous order concerning the parties' motions for summary judgment. As stated previously, the plaintiff had moved for summary judgment on the defendant's defense of statute of limitations. (Doc. # 13). The defendant also moved for summary judgment arguing that the plaintiff failed to file and serve its summons and complaint within the applicable statute of limitations. (Doc. # 10). On February 12, 2002, a hearing was convened before the undersigned in these matters and both sides presented oral argument of their respective positions. Supplemental hearings were also conducted relating to these matters.

On February 15, 2002, in reliance upon the facts as

represented by the plaintiff's counsel in his sworn affidavit, the undersigned issued an order granting the plaintiff's motion to strike the defendant's statute of limitations defense contained in its answer and denying the defendant's motion for summary judgment. All parties agree that the facts, as represented in counsel's affidavit were inaccurate. As such, the undersigned agrees that reconsideration of his previous order issued in this case is appropriate.

In this legal action, the plaintiff now properly alleges that its train derailed on March 18, 1999, as a result of the defendant's negligence in maintaining a water dam which ruptured and washed away the railroad tracks supporting the train. Previously, plaintiff's legal counsel had mistakenly represented to the Court that the train derailment had occurred on March 25, 1998. In any event, applying relevant state law, the statute of limitations in this case is still three (3) years from the date of the train accident. Hence, it is now undisputed that the plaintiff had only until March 18, 2001, to file and serve the summons and complaint in this lawsuit.

As the disputed summary judgment record now reflects, the instant action was initiated by the plaintiff, within the statute of limitations period, with the filing of a complaint on March 12, 2001. As well, according to the affidavit of Frank Gordon ("Gordon"), attorney for the plaintiff, a copy of the complaint was forwarded to John Lay ("Lay"), attorney for the defendant, on March 22, 2001, after the statute of limitations had expired. According to Gordon, Lay requested, on January 11, 2002,

within the statute of limitations period, that the instant lawsuit not be served on Winston Godwin, president of Carolina Feed Mills, Inc. Thereafter, service was accomplished, but not within the requisite three (3) years from the date of the train derailment. No genuine issue of material facts exists on this issue.

On April 26, 2001, legal counsel for the defendant filed a "Waiver of Service" form which provided in relevant part that:

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that Carolina Feed Mills, Inc., a Corporation, be served with judicial process in the manner provided by Rule 4. Carolina Feed Mills, Inc., a Corporation, will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons. (Emphasis added).
(Doc. #3).

In the defendant's answer to the plaintiff's complaint, the defendant asserts, in part, that:

The allegations as alleged by Plaintiff are barred by the appropriate statutes of limitations.

(Doc. #4).

The defendant did not raise the defense of

insufficiency of service of process in its answer. As stated above, the plaintiff initially argues that the defendant waived its right to contest the sufficiency of service of process by failing to properly challenge the service in its answer. The undersigned does not find the plaintiff's argument in this regard persuasive. In particular, the plaintiff's reliance upon the South Carolina Court of Appeals decision in Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. Ct. App. 2000) is misplaced. Specifically, Unisun is factually distinguishable from the facts of this case, since service of process was not admittedly attempted until after the statute of limitations period had already run in the instant case. The Unisun case focuses on a service of process issue. This case focuses on a commencement of the lawsuit issue.

As recently held by United States District Court Judge David C. Norton in Alday v. Tecphy Division Firminy, 10 F. Supp. 2d 562 (D.S.C. 1998) *aff'd* 182 f.3d 906 (4th Cir. 1999) (unpublished opinion), a case factually similar to the case now before the Court:

> Under South Carolina law, an action is commenced by filing and service of the summons and complaint unless otherwise tolled. S.C.R.C.P. 3(a); Collins, 901 F.Supp. at 1041 n. 1; 738 F.Supp. at 1511. Although Plaintiffs filed their Complaint before the statute of limitations ran, they concede that they did not serve Defendant with the Summons and Complaint until more than three years after the accident. . .

Accordingly, Judge Norton properly granted the defendant's motion for summary judgment on the grounds that the plaintiffs did not timely commence their action, because it was not filed and served within the statute of limitations period. The Alday case is persuasive here. This decision was appealed to, and affirmed by, the Fourth Circuit Court of Appeals. Consequently, the undersigned is compelled to conclude that the defendant's statute of limitations defense would preclude the plaintiff's recovery of damages in this case.

However, the defendant may be estopped from claiming its statute of limitations defense if the defendant's conduct has "induced the delay that otherwise would give operation to the statute." Moates v. Bobb, 470 S.E.2d 402 (S.C. Ct. App. 1996) *citing* Vines v. Self Memorial Hosp., 443 S.E.2d 909 (S.C. Sup. Ct. 1994). The plaintiff has not made a sufficient showing in this regard. To the contrary, the parties freely admit that the parties never discussed the applicable statute of limitations. While the defendant's legal counsel did agree to accept service on behalf of his client, he did not agree to forego his client's statute of limitations defense. Defendant's legal counsel only executed a waiver stating that he retained all defenses or objections except for objections "based on a defect in the summons or service of the summons." No representations were made relating to any statute of limitations defense. No genuine issue of material facts exist on this issue. Thus, the undersigned also concludes that the defense of statute of limitations was not waived by legal counsel for the defendant. Viewing the facts as alleged in the light most favorable to the plaintiff,

nothing in the record indicates that the defendant did anything to "lull" the plaintiff into believing that it did not need to timely commence the instant action. Hence, "it would be highly unfair to expose [the defendant] now to the immense potential liability of this claim after the [plaintiff]" failed to serve the lawsuit within the statute of limitations. Id.

In conclusion, the undersigned GRANTS the defendant's motion to amend and/or alter the undersigned's previous order concerning the parties' motions for summary judgment. The defendant's motion for summary judgment relating to its defense of statute of limitations is now GRANTED. (Doc. # 10). Likewise, the plaintiffs motion for summary judgment relating to the defendant's defense of statute of limitations is now DENIED. (Doc. # 13). For these reasons, this action is hereby DISMISSED.
IT IS SO ORDERED.
Terry L. Wooten

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

NO. 4:01-725-25

CSX TRANSPORTATION, INC.,
Plaintiff,

v.

CAROLINA FEED MILLS, INC.,
Defendant.

ORDER

This matter comes before the undersigned upon the parties' motions for summary judgment. In particular, the plaintiff has moved for partial summary judgment in this matter seeking summary judgment on the defendant's defense of statute of limitations. (Doc. # 13). According to the plaintiff, it should be entitled to judgment as a matter of law in regards to the defendant's defense of statute of limitations since: (1) the defendant has waived any statute of limitations defense and (2) the defendant is estopped from asserting any statute of limitations defense. According to the defendant, it is entitled to summary judgment since the plaintiff allegedly failed to file and serve its summons and complaint within the applicable statute of limitations. (Doc. # 10). On February 12, 2002, a hearing was convened before the undersigned in these matters and both

sides presented oral argument of their respective positions. These pending matters are now ready for disposition.

In this legal action, the plaintiff alleges that its train derailed on March 25, 1998, as a result of the defendant's negligence in maintaining a water dam which ruptured and washed away the railroad tracks supporting the train. Applying relevant state law, the statute of limitations in this case was three (3) years from the date of the train accident. Hence, the plaintiff had until March 25, 2001, to file and serve the summons an complaint in this lawsuit.

As the summary judgment record reflects, the instant action was initiated by the plaintiff, within the statute of limitations period, with the filing of a complaint on March 12, 2001. As well, according to the affidavit of Frank Gordon, attorney for the plaintiff, a copy of the complaint was forwarded to John Lay, attorney for the defendant, on March 22, 2001. According to Gordon, Mr. Lay requested, with the statute of limitations period, that the instant lawsuit not be served on Winston Godwin, president of Carolina Feed Mills, Inc. Thereafter, service was accomplished, but not allegedly within the requisite three (3) years from the date of the train derailment.

On April 26, 2001, legal counsel for the defendant filed a "Waiver of Service" form which provided in relevant part that:

> I agree to save the cost of service of a summons and an additional copy of the

> complaint in this lawsuit by not requiring that Carolina Feed Mills, Inc. a Corporation, be served with judicial process in the manner provided by Rule 4.
>
> Carolina Feed Mills, Inc., a Corporation, will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons. (Emphasis added).
> (Doc. # 3).

In the defendant's answer to the plaintiff's complaint, the defendant asserts, in part, that:

> The allegations as alleged by Plaintiff are barred by the appropriate statutes of limitations.
>
> (Doc. # 4).

However, the defendant did not raise the defense of insufficiency of service of process in its answer, but instead raised the statute of limitations defense.

As stated above, the plaintiff argues that the defendant waived its right to contest the sufficiency of process by failing to properly challenge the service in its answer. The undersigned finds case law supporting this position. In particular, as was the case in Unisun Insurance

v. Hawkins, 342 S.C. 537 (S.C. Ct. App. 2000), the defendant did not allege insufficiency of service of process with even a "minimal amount of specificity in his responsive pleading." In this case, the defendant only alleged the defense of the statute of limitations in its answer. No genuine issue of material fact exists on this issue. Under the circumstances set forth in this case, and the supporting case law, the undersigned concludes that the defendant has waived any defense of insufficiency of service of process. In this case, the defendant "may not bootstrap the [insufficiency of service of process] defense to his statute of limitations argument." Id.

Furthermore, even if the defendant had raised the insufficiency of service of process defense in its answer, the defendant would not prevail on its motion for summary judgment. It is undisputed that the plaintiff timely filed this lawsuit within the three (3) year statute of limitations period. However, it is also reasonable to conclude that the plaintiff could have served this lawsuit within the requisite three (3) year statute of limitations period, but for the actions of defendant's legal counsel. Specifically, according to plaintiff's legal counsel, and not contested by the defendant's legal counsel, the attorney for the defendant specifically requested that he personally be served, and that the president of Carolina Feed Mills, Inc., Winston Godwin, not be served. Evidence of record indicates that a copy of the summons and complaint was forwarded to legal counsel for the defendant within the applicable three (3) year statute of limitations.

Finally, defendant's legal counsel executed a waiver stating that he retained all defenses or objections except for objections "based on a defect in the summons or service of the summons." Thus, the defense of insufficiency of service of process was waived by legal counsel for the defendant. According to the defendant, all other defenses or objections were preserved. This waiver weighs in favor of the plaintiff.

In sum, the undersigned concludes that the defendant has waived the defense of insufficiency of service of process. Similarly, the undersigned also concludes that the defendant should also be estopped from asserting either insufficiency of service of process defense or statute of limitations defenses. Therefore, the plaintiff's motion for summary judgment relating to the defendant's defense of statute of limitations is **GRANTED**. (Doc. # 13). Likewise, the defendant's motion for summary judgment relating to its defense of statute of limitations is **DENIED**. (Doc. # 10). The undersigned notes that any ruling otherwise would deny the parties an opportunity to present their position in court based on the conduct of counsel and not based on the conduct of the parties to this action.

IT IS SO ORDERED.
Terry L. Wooten
U.S. District Court Judge

Florence, South Carolina
February 15, 2002

Rule 12(h)(1), South Carolina Rules of Civil Procedure:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

SUPREME COURT, U.S.
FILED
APR 18
CLERK

No. 02-1368

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

CAROLINA FEED MILLS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. LAY, JR.*
M. CATHERIN CAUTHEN
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190

Counsel for Respondent Carolina Feed Mills, Inc.

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

HP

QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals properly affirmed the district court's grant of summary judgment to Carolina Feed Mills, Inc. when CSX failed to commence the action within the applicable South Carolina statute of limitations.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the case caption; however, the proper name of the Respondent is "Carolina Feed Mills, Inc." There is no parent or publicly held company owning 10% or more of the Respondent's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT FOR CERTIORARI BECAUSE THERE IS NO COMPELLING REASON FOR THIS COURT TO DECIDE A MATTER OF SOUTH CAROLINA LAW	5
II. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE FOURTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF SOUTH CAROLINA LAW	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Blyth v. Marcus, 470 S.E.2d 389 (S.C. Ct. App. 1996) 6
Eastern Refractories Co., Inc. v. Forty Eight Insulations, Inc., 157 F.3d 169 (2nd Cir. 1998) 8
Garner v. Houck, 435 S.E.2d 847 (S.C. 1993) 3, 5, 7, 8
Hoffman v. Benson, 147 F.R.D. 205 (W.D.Mo. 1993) 8
Jones v. St. Tammany Parish Jail, 4 F. Supp. 2d 606 (E.D. La. 1998) 8
Unisun Insurance v. Hawkins, 537 S.E.2d 559 (S.C. Ct. App. 2000) 3, 5, 7, 8
Walker v. Armco Steel Corp., 446 U.S. 740 (1978) 2, 6

STATUTES

S.C. Code Ann. § 15-3-20 (Law. Co-op. Supp. 2002) 2

RULES

Fed. R. Civ. P. 4(d) 3
Fed. R. Civ. P. 4(d)(2) 6
Fed. R. Civ. P. 4(d)(4) 6
Fed. R. Civ. P. 4(m) 8
Fed. R. Civ. P. 12(b)(5) 4
S.C.R. Civ. P. 3(a) 2, 6, 8
S.C.R. Civ. P. 3(b) 7
S.C.R. Civ. P. 4 8
Sup. Ct. R. 10 5

IN THE

Supreme Court of the United States

No. 02-1368

CSX TRANSPORTATION, INC.,
Petitioner,

v.

CAROLINA FEED MILLS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

South Carolina Rule of Civil Procedure 3(a): A civil action is commenced by filing and service of a summons and complaint.

STATEMENT OF THE CASE

This appeal arises from a negligence action to recover property damages, brought by CSX in the United States District Court for the District of South Carolina under diversity jurisdiction, and thus governed by state law. The issue on appeal is simply whether the Fourth Circuit properly affirmed the district court's finding that CSX failed to

commence the action within the applicable South Carolina statute of limitations. (*See* Pet. at 2-3.) There is no federal question, nor is there a compelling issue of national importance. Both lower courts properly found that the South Carolina rule of law CSX claims applies to this case is inapplicable. (*See* Pet. App. at 1a, 6a.) CSX never petitioned to certify this question to the South Carolina Supreme Court, nor did CSX petition for a rehearing by the Fourth Circuit. Instead, CSX comes directly to this Court for a review of the lower court's grant of summary judgment. (*See* Pet. at i.)

In district court, Carolina Feed Mills moved for summary judgment on the grounds that CSX failed to commence the action within the applicable South Carolina statute of limitations. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1978) (state law on commencement of an action for purposes of the statute of limitations applies when in federal court under diversity jurisdiction). Under South Carolina law, an action is deemed "commenced" for purposes of the statute of limitations when the summons and complaint are filed with the court *and* served upon the defendant. *See* S.C.R. Civ. P. 3(a).[1] Here, while the summons and complaint were filed in time, there was no question that CSX failed to serve Carolina Feed Mills before the limitations period expired.[2] (*See* Pet.

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[1] Under the recent amendment of a South Carolina statute (not applicable to this case, *see* Pet. App. at 4a-5a, n.*), an action now may be deemed commenced upon filing *if* actual service is accomplished within 120 days thereafter. *See* S.C. Code Ann. § 15-3-20 (Law. Co-op. Supp. 2002).

[2] Three months before the limitations period expired, counsel for Carolina Feed agreed to waive formal service and asked CSX to serve counsel rather than formally serving Carolina Feed. Then, two months before the expiration, counsel for Carolina Feed sent a letter reminding counsel for CSX that he had agreed to accept service and that he was "waiting on service of the complaint." (*See* Pet. App. at 3a.) Nevertheless, counsel for CSX did not serve the summons and complaint until after the limitations period expired. (*See id.*)

App. at 3a-4a, 9a.) Consequently, Carolina Feed asserted the statute of limitations defense and moved for summary judgment. (*See id.* at 4a.)

In opposition to summary judgment, CSX argued that Carolina Feed's waiver of formal service of the summons had also waived its statute of limitations defense.[3] (*See* Pet. at 3.) CSX maintained that, in South Carolina, any defendant asserting a limitations defense based on the failure to serve within the statute of limitations must also assert a Rule 12 insufficient service of process defense.[4] (*See id.* (citing *Garner v. Houck*, 435 S.E.2d 847 (S.C. 1993); *Unisun Ins. v. Hawkins*, 537 S.E.2d 559 (S.C. Ct. App. 2000), *cert.*

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[3] Counsel for Carolina Feed signed a notice of lawsuit and request for waiver of summons, which had been provided by CSX. (*See* Pet. App. at 4a.) *See* Fed. R. Civ. P. 4(d) (imposing duty to save costs by waiving formal service). The waiver explicitly waived only defenses based on insufficiency of service of process: Carolina Feed's counsel "agree[d]to save the cost of service of a summons and . . . complaint by not requiring that Carolina Feed Mills, Inc. be served with judicial process. Carolina Feed Mills, Inc. . . . will retain all defenses . . . except for objections based on a defect in the summons or in the service of the summons." (*See id.* at 8a.)

[4] CSX is asking this Court to adopt a South Carolina rule of law with several illogical results. First, South Carolina's statute of limitations defense would melt into its insufficiency of service of process defense—the limitations defense would never stand alone as a separate defense. Secondly (and nonsensically), under CSX's argument, a defendant must assert an insufficient service of process defense even if service fully complied with Rule 4. Just as in this case, Carolina Feed waived formal service under Rule 4, yet CSX argues Carolina Feed nevertheless should have raised insufficient service as a defense. Moreover, a waiver of formal service under CSX's rule would mean that a plaintiff need not serve at all—accepting CSX's argument would mean that CSX could have waited a full year past the limitations deadline, or even never serve Carolina Feed at all. Finally, such a ruling would have a chilling effect on practitioners agreeing to waive formal service in an effort to save costs. *See* Fed. R. Civ. P. 4(d) (imposing duty to save costs by waiving formal service).

dismissed, 564 S.E.2d 676 (S.C. 2002).) *See* Fed. R. Civ. P. 12(b)(5) (defense of "insufficiency of service of process"). Initially, the district court denied summary judgment because of an erroneous affidavit submitted by counsel for CSX. (*See* Pet. App. at 6a-7a.) The erroneous affidavit contained an error in the date of the incident which gave rise to the claims, thus making it appear that CSX had commenced the action within the limitations period.[5] (*See id.*) When counsel for CSX corrected the affidavit, showing the actual date the incident occurred, the district court reversed its previous order and granted summary judgment to Carolina Feed. (*See id.*)

On appeal, the Fourth Circuit affirmed and adopted the reasoning in the district court's opinion, including a finding that CSX failed to commence the action within the South Carolina statute of limitations and that Carolina Feed's waiver of sufficiency of service had no effect on its limitations defense. (*See id.* at 5a.) Furthermore, the district court specifically had found that CSX's reliance on South Carolina case law holding that a waiver of the service of process defense also waives the limitations defense was "misplaced" and not applicable to this case. (*See id.* at 9a.) The district court had properly distinguished between cases, such as this one, where there was late but proper service (and thus no Rule 4 defect), from cases where the limitations defense is based solely on a Rule 4 defect in service. (*See id.*) Only in the latter instance, when a statute of limitations defense depends upon showing insufficient service of process, is the Rule 12(b)(5) defense of insufficiency of

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[5] The Petition omits any reference to the fact that the sole basis for the district court's initial denial of summary judgment to Carolina Feed was the erroneous date in CSX's counsel's affidavit. (*See* Pet. at 2.) Carolina Feed wishes to note this omission in an effort to avoid the Court's drawing from the Petition any inference that the district court arbitrarily "chang[ed] its mind and revers[ed] itself on the issue of waiver." (*See* Pet. at 2, 7.)

service critical to the limitations defense. *See Garner* at 850; *Unisun* at 561. Carolina Feed's limitations defense was based only on late service, not on insufficient service; therefore, there was no need for Carolina Feed to preserve its insufficiency of service of process defense. (*See* Pet. App. at 9a.)

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT FOR CERTIORARI BECAUSE THERE IS NO COMPELLING REASON FOR THIS COURT TO DECIDE A MATTER OF SOUTH CAROLINA LAW.

CSX presents absolutely no reason for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10 (basis for petition must be "compelling" for Court to exercise its discretion). The entire basis for CSX's Petition is: "The district court and the court of appeals erred as a matter of law." (*See* Pet. at 2. *See also id.* at i (Question Presented is whether the lower courts erred in concluding Carolina Feed did not waive its statute of limitations defense).) And, as the Supreme Court Rules clearly state, a "petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. As shown in the following section, the lower courts properly stated the controlling rule of South Carolina law, and properly applied the law to the facts of this case. Finally, CSX does not argue—nor could it—that there is any "rare" circumstance justifying this Court's grant of a petition for writ of certiorari or any other compelling reason, such as those set out in Supreme Court Rule 10. *See id.* Consequently, this Court should deny the petition.

II. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE FOURTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF SOUTH CAROLINA LAW.

CSX simply failed to commence this action within the South Carolina statute of limitations. *See Walker v. Armco Steel*, 446 U.S. 740 (when in federal court on diversity jurisdiction, state law determines when an action is commenced for purposes of tolling the statute of limitations). In South Carolina, the statute of limitations is tolled when an action is commenced by filing *and* actual service of the summons and complaint. *See Blyth v. Marcus*, 470 S.E.2d 389, 390 (S.C. Ct. App. 1996); S.C.R. Civ. P. 3(a). There is no question that CSX did file within the limitations period, and there is no question that CSX *did not* serve the summons and complaint until after the limitations period expired. (*See* Pet. App. at 3a-4a.) Carolina Feed clearly waived formal service of process under Rule 4 and has no basis to claim that service of process was insufficient;[6] therefore, Carolina Feed had no 12(b)(5) insufficient service of process defense to assert. Nevertheless, CSX argues that Carolina Feed should have asserted this defense in order to be entitled to its statute of limitations defense. (*See* Pet. at 3.)

CSX incorrectly claims that, under South Carolina law, the insufficient service of process defense and the statute of limitations defense are "'inextricably tied'" together, and any "defendant asserting a limitations defense must also assert . . . service of process defenses where limitations allegedly

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[6] Obviously, a waiver of formal service does not mean that service is waived altogether. The plaintiff still must provide the filed summons and complaint to counsel for the defendant, along with a notice and waiver of service form. *See* Fed. R. Civ. 4(d)(2). Then, counsel for the defendant must sign the waiver and return it to the plaintiff for filing. *Only when the waiver is filed is the action deemed "served." See id.* at 4(d)(4).

expired due to untimely service." (*See id.* at 2-3, 5 (citing *Garner* at 850; *Unisun* at 561).) CSX argues a misapplication of the *Garner*[7] and *Unisun*[8] decisions in an attempt to bootstrap the issue of sufficiency of service of process into this case. Both cases involved insufficient attempts at service, and insufficient service was the defendants' only basis for claiming the plaintiffs were "untimely" in commencing the actions prior to the expiration of the statute of limitations. *See Garner* at 850; *Unisun* at 560. Even CSX's Petition highlights this fact, stating the two cases involve

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[7] The Petition fails to include the material facts of *Garner* which illustrate the decision's inapplicability to this case. (*See* Pet. at 3.) There, the plaintiff attempted to commence the action by delivering the summons and complaint to the sheriff. *See Garner* at 848. Delivery of the summons and complaint to the sheriff of the county where the defendant "usually or last resided" is the equivalent of commencing the action for purposes of tolling the statute of limitations, *provided* that actual service is then accomplished within a reasonable time thereafter. *See* S.C.R. Civ. P. 3(b). The court found that the action was commenced by the delivery of the summons and complaint to the sheriff; however, the defendants argued the sheriff had never properly perfected service because he served the wrong person, and thus the action had not been "commenced." *See Garner* at 848, 850. Because the defendants had failed to raise insufficient service of process as a defense in their answer, the court found that they could not assert insufficient service as the basis for their statute of limitations defense. *See id.* at 850.

[8] Both the district court and the Fourth Circuit specifically held that *Unisun* was inapplicable to this case; however, CSX's Petition fails to provide the material facts necessary to understand the context of the South Carolina Court of Appeal's holding in *Unisun* and why it does not apply. (*See* Pet. at 3-4; Pet. App. at 5a, 9a.) There, the plaintiff filed the complaint and attempted service on one of the defendants *prior to* the expiration of the limitations period. *See Unisun* at 560. Although the attempted service was improper, the defendant failed to raise insufficiency of service of process as a defense. When the defendant moved for summary judgment, claiming the plaintiff had failed to commence the action within the statute of limitations, the court found that the failure to raise the insufficiency of service defense had resulted in a waiver of the statute of limitations defense based on insufficiency of service. *See id.* at 561.

"the assertion of [a] statute of limitations defense *which is based on inadequate service of process.*" (*See* Pet. at 3 (emphasis added).)

Contrary to CSX's argument, "untimely" service is not *always* "insufficient service of process under Rule 12(b)(5)." (*See id.* at 6.) It is true that, when attempted service fails and results in the failure to timely commence the action prior to the expiration of the limitations period, a defendant must plead both defenses. *See Garner* at 850; *Unisun* at 561. In that limited circumstance, the limitations defense only succeeds if the attempted service is deemed insufficient under Rule 4, and thus the limitations defense depends on the viability of the sufficiency of service defense. *Nevertheless, that rule of law does not apply to this case.*[9] Here, there is no Rule 4 defect in service of process; thus, obviously, insufficient service of process is not the basis for Carolina

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[9] Similarly, CSX cites three federal cases which, like *Garner* and *Unisun*, are inapplicable here because they deal with insufficient service of process. (*See* Pet. at 6 (citing *Eastern Refractories Co. v. Forty Eight Insulations, Inc.*, 157 F.3d 169 (2nd Cir. 1998); *Jones v. St. Tammany Parish Jail*, 4 F. Supp. 2d 606 (E.D. La. 1998); *Hoffman v. Benson*, 147 F.R.D. 205 (W.D.Mo. 1993).) All three cases involve "untimely," and thus insufficient, service under Federal Rule of Civil Procedure 4. *See id. See also* Fed. R. Civ. P. 4(m). Federal Rule 4 requires service within 120 days of filing the complaint, and the "timeliness" issue in those cases relates only to service under that Rule 4 requirement. *Compare id. with* S.C.R. Civ. P. 3(a), 4 (South Carolina Rules contain no provision allowing for actual service 120 days later. Actual service must be accomplished before the action is "commenced."). Any statute of limitations defense in those cases arose only as a result of a Rule 4 timeliness defect—none of the cases deal with *sufficient* but "untimely" service solely for purposes of the statute of limitations. *See Eastern Refractories* at 173; *Jones* at 610, 610 n.2; *Hoffman* at 206-07. Indeed, counsel for Carolina Feed is unable to find any case in any state (much less in South Carolina) to support the blanket rule urged by CSX that all waivers of formal service under Rule 4 also waive all statute of limitations defenses.

Feed's statute of limitations claim. Consequently, "untimely" service in this case is purely a statute of limitations issue.

Carolina Feed's limitations defense is based solely on late service—CSX made *no attempt* at service prior to the expiration of the limitations period. Because there is no issue of inadequate service of process here, *Garner* and *Unisun* do not apply and it is irrelevant that Carolina Feed waived the sufficiency of service of process defense. Both the Fourth Circuit and the district court recognized this important factual difference between this case and the South Carolina case law relied upon by CSX. For this reason, the Fourth Circuit correctly affirmed the district court's grant of summary judgment to Carolina Feed. As a result, there is no reason for this Court to review the lower courts' application of South Carolina law to the facts of this case, and the Court should deny CSX's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should deny CSX's petition for a writ of certiorari.

Respectfully submitted,

JOHN T. LAY, JR.*
M. CATHERIN CAUTHEN
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190

Counsel for Respondent
Carolina Feed Mills, Inc.

* Counsel of Record

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